BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY
AT WELLINGTON

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

AND

IN THE MATTER of applications for marine consents and marine discharge consents by Trans-Tasman Resources Limited to undertake iron ore extraction and processing operations offshore in the South Taranaki Bight

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MEMORANDUM OF COUNSEL ASSISTING THE DECISION-MAKING COMMITTEE – RESPONSE TO MINUTE 40

13 April 2017

Environmental Protection Authority
Wellington

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MAY IT PLEASE THE COMMITTEE:

INTRODUCTION

1. This memorandum responds to Minute 40, in which the Decision-Making Committee ("**DMC**") asked counsel to provide advice on a number of matters relating to potential conditions (as well as a number of more general matters, to be addressed in a subsequent memorandum).

2. This advice addresses the following questions:

   (a) In what circumstances is the DMC able to consider imposing conditions that overlap with requirements of a mining permit or other marine management regimes ("**MMRs**"), including in respect of health and safety?

   (b) What is the scope of the DMC's power to impose conditions requiring a consent holder to obtain public liability insurance and how might such conditions address effects on the environment and existing interests?

   (c) What is the scope of the DMC's power to impose conditions requiring a bond?

   (d) What is the scope for the DMC to monitor activities associated with the mining activity that are not restricted by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("**the Act**")?

   (e) What limitations (if any) are there on the DMC in respect of imposing conditions that require different operational parameters from the description of the activity in the application that was publicly notified?

   (f) What relevance does the boundary of the mining permit have to the application for marine consents?

3. In general, when considering the present application for marine consent (and submissions on it) the DMC must take into account various matters under section 59, including any effects on the environment or existing interests of allowing the activity and *"the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity"*.[1]

4. Section 63 provides as follows:

[1] Section 59(2)(j).

"(1) The Environmental Protection Authority may grant a marine consent on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests.

(2) The conditions that the EPA may impose include, but are not limited to, conditions—

(a) requiring the consent holder to—

(i) provide a bond for the performance of any 1 or more conditions of the consent:

(ii) obtain and maintain public liability insurance of a specified value:

(iii) monitor, and report on, the exercise of the consent and the effects of the activity it authorises:

(iv) appoint an observer to monitor the activity authorised by the consent and its effects on the environment:

(v) make records related to the activity authorised by the consent available for audit:

(b) that together amount or contribute to an adaptive management approach.

(3) However, the EPA must not impose a condition on a consent if the condition would be inconsistent with this Act or any regulations.

(4) To avoid doubt, the EPA may not impose a condition to deal with an effect if the condition would conflict with a measure required in relation to the activity by another marine management regime or the Health and Safety at Work Act 2015."

5. In our view this broad power, and the associated powers relating to conditions (such as those set out in sections 64 to 67), are limited by administrative law principles governing the validity of conditions, such as those set out in the case of *Newbury*.[2] The *Newbury* principles go to matters such as conditions being reasonable, being for a proper purpose, and fairly relating to the development authorised by the consent. Other applicable

[2] *Newbury DC v Secretary of State for the Environment; Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).

administrative law principles include that a condition must be certain, *intra vires*, not involve a delegation of the DMC's decision-making function, and not have the potential to frustrate or nullify the grant of a consent.

6. Against that background, we address the DMC's questions in turn below.

CONDITIONS THAT OVERLAP WITH REQUIREMENTS OF OTHER MMRs

In what circumstances is the DMC able to consider imposing conditions that overlap with requirements of a mining permit or other MMRs, including in respect of health and safety?

7. Section 59(2)(h) of the Act requires the DMC, when considering an application for a marine consent and submissions on the application, to *"take into account"* the nature and effect of other MMRs.[3] Section 59(2)(l) requires the DMC to take into account *"any other applicable law"*.

8. As noted above, section 63 gives the DMC a broad discretion to impose conditions and section 63(4) provides, to avoid doubt, that *"the EPA may not impose a condition to deal with an effect if the condition would conflict with a measure required in relation to the activity by another marine management regime or the Health and Safety at Work Act 2015."*

9. In our view it is clear that the DMC is able, lawfully, to impose a condition that overlaps with (or duplicates) the requirements of another MMR or the Health and Safety at Work Act 2015 ("**HSWA**"), provided that it meets the requirements of section 63, as well as the *Newbury* tests and administrative law principles summarised above. What the DMC is unable to do is impose a condition that would **conflict with** a requirement of another MMR or HSWA.

10. This interpretation is supported by the Act's legislative history; the current wording was inserted into the Bill after the Select Committee stage, in place of the following wording:

> *"To avoid doubt, the EPA may not impose a condition to deal with an effect if the condition **would have the same or similar effect as**, or conflict with, a measure required in relation to the activity by another marine management regime or the Health and Safety in Employment Act 1992"* (emphasis added).

[3] The term *"marine management regime"* is defined in section 7.

11. Therefore Parliament expressly considered, and rejected, a provision that would have prohibited the EPA from imposing conditions duplicating the requirements of other MMRs or health and safety legislation.

12. That said, it is a matter for the DMC, if it is minded to grant consent, to determine which conditions it considers are appropriate to deal with adverse effects on the environment or existing interests. In doing so, the DMC must consider the reasonableness of any conditions and, in that context, whether there is any practical benefit in imposing a condition that merely duplicates a requirement of another MMR or HSWA. A useful process may be for the DMC to ask whether a condition duplicating a requirement of an MMR or HSWA would further the purpose of the Act.

13. In our view it is conceivable, for example, that marine consent conditions could validly require a consent holder to provide the EPA with a document produced to meet the requirements of an MMR.[4] In that example, a document prepared for the purposes of one piece of legislation would be provided to the EPA for different legislative (or practical) purposes.

14. It is also conceivable that, in other circumstances, a marine consent condition merely duplicating a requirement of HSWA or an MMR (a requirement originally intended to further the purpose of HSWA or the legislation relating to the MMR) would not meaningfully contribute to furthering the purpose of the Act.

15. In that context, we note that the Act's purpose is quite distinct from that of HSWA. The purpose of HSWA focuses squarely on the health and safety of workers and workplaces,[5] whereas potential effects on people (other than those with existing interests) are less clearly a focus in marine consent processes under the Act. That is, there are numerous indications in the Act, particularly when contrasted with the Resource Management Act 1991 ("**RMA**"), that effects on people are less relevant to marine consents than is the case for resource consents. These include narrower definitions in the Act of:

    (a) *"environment"*, which excludes *"amenity values"* and *"social, economic, aesthetic, and cultural conditions which affect"* the other aspects making up the environment (matters included under the corresponding RMA definition), and which does not expressly include *"people and*

[4] In any event, such a condition may not, strictly speaking, 'duplicate' the requirements of the MMR.
[5] Section 3 of HSWA.

communities" when referring to ecosystems and their constituent parts; and

(b) *"sustainable management"*, which does not refer to social and cultural wellbeing.

16. We note too, in relation to the DMC's specific reference to conditions relating to health and safety, that the Act appears to distinguish between marine discharges of harmful substances, on the one hand, and activities authorised by a marine consent on the other. That is, there is a difference in wording between:

(a) section 59(2)(c) of the Act, which requires the EPA, when considering an application for a marine consent, to take into account *"the effects on human health that may arise from effects on the environment*"; and

(b) section 87D(2)(a)(ii), which requires the EPA, when considering an application for a marine discharge consent in relation to the discharge of harmful substances, to take into account "*the effects on human health of the discharge of harmful substances if consent is granted*".[6]

17. The difference in wording indicates that Parliament intended:

(a) section 59(2)(c) to require the EPA to take into account effects on human health that may arise from effects on the environment, which are derivative effects falling within a narrower category than those contemplated by section 87D; and

(b) section 87D to require consideration of the effects on human health of the discharge of harmful substances if consent is granted, irrespective of whether those effects may arise from effects on the environment.

18. In a practical sense, however, it is difficult to conceive of 'direct effects' on human health that do not arise from effects on the environment – that is, effects that are relevant to the broader consideration under section 87D but not under section 59(2)(c).

[6] There is an equivalent obligation in respect of dumping of waste or other matter in section 87D(2)(b)(ii).

CONDITIONS REQUIRING PUBLIC LIABILITY INSURANCE

What is the scope of the DMC's power to impose conditions requiring a consent holder to obtain public liability insurance and how might such conditions address effects on the environment and existing interests?

19. Section 63(2)(a)(ii) of the Act provides the DMC with an express power to impose a condition on a marine consent requiring the consent holder to *"obtain and maintain public liability insurance of a specified value"*. Such insurance would provide protection to the consent holder from legal liability, up to the insured value, for damage to property owned by a third party.

20. That express power can be read as falling within the general condition-making power in section 63(1), and thus a condition requiring insurance cover is one potential way of *"[dealing] with adverse effects of the activity authorised by the consent on the environment or existing interests"*.

21. Rather than dealing with the anticipated or likely adverse effects of the proposed activity, however, in our view it is implicit that section 63(2)(a)(ii) is intended to deal with potential effects of low probability that nonetheless cannot be ruled out altogether (and which may have a high potential impact).

22. Insurance could help deal with such effects because, without it, there would be a risk of the consent holder negligently causing damage to a third party with an existing interest (for example), but having insufficient resources to compensate the third party for that damage.

23. One key consideration relating to imposing such a condition is therefore likely to be identifying the events intended to trigger liability under the policy. Another consideration is likely to be fixing an appropriate value for the insurance cover.

24. Depending on the circumstances, there may be a logical way forward in respect of these issues; that is, the events intended to trigger liability may be well understood, and information may be available about the likely cost of damage arising from such events.

25. Beyond that, there is little guidance from past decisions under the Act or in the RMA context as to how to impose conditions relating to insurance. The EPA has not yet exercised the section 63(2)(a)(ii) power in the context of a notified marine consent application, but the issue of insurance has been discussed in a number of cases, as follows:

(a) In the application for marine consent by Shell Todd Oil Services ("**STOS**") relating to its Māui platforms, argument was heard about the requirement to hold public liability insurance in relation to *"offshore installations"* under Part 26A of the Maritime Transport Act 1994;[7] no marine consent condition relating to insurance was imposed, however.

(b) Likewise, the marine consent granted to OMV New Zealand Limited for development drilling at the Maari oil field omitted an insurance condition, seemingly on the basis that the Maritime New Zealand regime has the primary regulatory role over oil spill preparedness and response.[8]

(c) In Trans-Tasman Resources Limited's ("**TTRL**") previous application for marine consent, the applicant proposed draft conditions that read:

> *"The Consent Holder must ensure that it maintains insurance including, but not limited to public liability insurance, for a sum not less than NZ$100,000,000 (2014 dollar value) for any one claim or series of claims arising from undertaking activities authorised by this marine consent"*;[9] and
>
> *"The Consent Holder must submit a certificate demonstrating that it holds the insurance required by Condition 15 prior to giving effect to this consent and an updated certificate annually by 1 July of each year for the term of this marine consent to the EPA."*[10]

26. There is no express power under the RMA to impose insurance-related conditions, but consent authorities have done so under the general condition-making power in section 108. Examples of the types of events and value of insurance cover in decisions under the RMA include:

(a) in the context of excavations required todevelop residential apartments, public liability insurance was to be obtained for a *"minimum sum of $10,000,000.00 prior to works commencing on the site"*;[11]

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[7] STOS Maui Offshore Facilities Marine Consent Application Hearing transcript 6 May 2015 at 350. *"Offshore installation"* is defined to include *"any artificial structure (including a floating structure other than a ship) used or intended to be used in or on, or anchored or attached to, the seabed for the purpose of the exploration for, or the exploitation or associated processing of, any mineral; but does not include a pipeline"* – section 222.
[8] Decision on marine consent application OMV New Zealand Ltd **EEZ000007** at [259].
[9] *Trans-Tasman Resources Ltd Marine Consent Decision* proposed draft condition 15.
[10] *Trans-Tasman Resources Ltd Marine Consent Decision* proposed draft condition 16.
[11] *ORC Ltd v Auckland City Council* A089/09 Environment Court, Auckland, 30/9/2009, condition 39.

(b) in the context of land use consents for mining: *"the consent holder shall effect and keep current public liability insurance for an amount not less than twenty million dollars"*;[12]

(c) in the context of the off-shore sinking of a vessel, the consent holder was to *"effect and maintain public liability insurance, from the launching of the vessel until the satisfactory sinking of the vessel, for an amount sufficient to remove the vessel in the event that it sinks in a place other than the intended site and becomes a navigation hazard"*;[13]

(d) in the context of consent for a multi-storey apartment complex (where consent was ultimately declined): *"the Consent Holder shall indemnify the Council from any and all liability resulting from the erection and operation of the construction zone and provide evidence prior to any work commencing that the Consent Holder has included the construction zone in a public liability insurance policy that gives cover for at least $5,000,000 for any one claim"*;[14] and

(e) in an application for land use consent to operate a quarantine facility *"that the resource consent holder maintain public liability insurance for all insurable risks to a minimum value of $1,000,000.00."*[15]

27. The form of condition wording therefore varies depending on the circumstances and complexity of the matter. In particular, insurance can be required for a range of events, from *"all insurable risks"* to more specific wording pinpointing risks related to specific elements of the consented activity. With this in mind, determining the risk to be insured against will be essential to ensuring that a drafted condition is both wide enough to cover the risk but not so wide as to prohibit, in effect, the consent holder from undertaking the activity enabled by the consent.

28. Lastly, we note that proposed conditions agreed as between TTRL and Origin Energy Resources Kupe Limited were tabled at the hearing on 16 March 2017. They include the following condition:

> *"The Consent Holder shall, while giving effect to these consents, maintain public liability insurance for a sum not less than*

[12] *Macraes Mining Company Ltd v Waitaki District Council* Environment Court, Christchurch, 9/4/1998, C035/98 at 35.
[13] *Te Komiti Taiao O Ngati v Bay of Plenty Regional Council Environment Court*, Auckland, 1/12/1999, A138/99, condition 9.1.
[14] *Royal Forest and Bird Protection Society Inc v Whakatane District Council* [2012] NZEnvC 38, condition 62.
[15] *Voice v Selwyn District Council Environment Court*, Christchurch, 5/5/2000, C88/2000 at 8.

NZ$500,000,000 (2016 dollar value) for any one claim or series of claims arising from giving effect to these consents to cover costs of environmental restoration and damage to the assets of existing interests (including any environmental restoration as a result of damage to those assets), required as a result of an unplanned event occurring during the exercise of these consents."

29. While put forward on an *Augier* basis, in our view such a condition could be imposed by the DMC under section 63(2)(a)(ii).

CONDITIONS REQUIRING A BOND

What is the scope of the DMC's power to impose conditions requiring a bond?

Introduction

30. Section 63(2)(a)(i) of the Act expressly empowers the DMC to impose a condition on a marine consent requiring the consent holder to *"provide a bond for the performance of any 1 or more conditions of the consent."*[16]

31. Section 65 provides further detail as to when, why, and how a bond may be imposed, as follows:

> *"(1) A bond required under section 63(2)(a)(i) may be given for the performance of any 1 or more conditions of a marine consent that the Environmental Protection Authority considers appropriate and may continue after the expiry of the consent to secure the ongoing performance of conditions relating to long-term effects, including—*
>
> *(a) a condition relating to the alteration, demolition, or removal of structures:*
>
> *(b) a condition relating to remedial, restoration, or maintenance work:*
>
> *(c) a condition providing for ongoing monitoring of long-term effects.*
>
> *(2) A condition of a consent that describes the terms of the bond may—*
>
> *(a) require that the bond be given before the consent is exercised or at any other time:*
>
> *(b) provide that the liability of the holder of the consent be not limited to the amount of the bond:*

[16] Note that a bond could not be imposed in circumstances that were contrary to section 63(3) or (4) of the Act.

(c) require the bond to be given to secure performance of conditions of the consent, including conditions relating to any adverse effects on the environment or existing interests that become apparent during or after the expiry of the consent:

(d) require the holder of the consent to provide such security as the EPA thinks fit for the performance of any condition of the bond:

(e) require the holder of the consent to provide a guarantor (acceptable to the EPA) to bind itself to pay for the carrying out of a condition in the event of a default by the holder or the occurrence of an adverse environmental effect requiring remedy:

(f) provide that the bond may be varied, cancelled, or renewed at any time by agreement between the holder and the EPA.

(3) If the EPA considers that an adverse effect may continue or arise at any time after the expiration of a marine consent, the EPA may require that a bond continue for a specified period that the EPA thinks fit."

32. In addition to these statutory requirements, a condition requiring a bond must also meet the common law requirements for conditions generally.

What may a bond cover?

33. The key requirement for a bond-related condition is that it must relate to – and in effect secure – the performance of one or more other conditions of consent.[17]

34. We understand that a bond condition is yet to be imposed on a marine consent, although Chatham Rock Phosphate Limited proffered such a condition. In that case counsel for the applicant gave the following explanation:[18]

> *"As far as the bond condition is concerned, because it is difficult to identify the particular effects or costs of those effects that it might need to address, it may be considered that it serves no useful purpose. It has been volunteered because it was suggested as being necessary by third parties, some of whom now criticise the condition. CRP does not consider that the condition is necessary, but is willing to have it in place as an "insurance policy" to the extent that it is a reflection of CRP's broader approach to corporate and environmental responsibility."*

[17] Section 63(2)(a)(i) and section 65(1) of the Act.
[18] Paragraph [348].

35. In relation to STOS's marine consent application concerning the Māui platforms, the applicant argued that bonds were unnecessary because STOS had insurance for spills and, for other matters, either the potential effects did not warrant imposition of a bond or could be addressed through enforcement action.[19]

36. The wording of sections 63(2)(a)(i) and 65 closely follow the equivalent provisions in the RMA.[20] In the RMA context, examples of obligations that have been secured by a bond include:

    (a) revegetation conditions ($1.6m);[21]

    (b) a rehabilitation and closure programme and the establishment and ongoing administration of a trust to own land;[22]

    (c) decommissioning costs ($3.1m initially);[23]

    (d) remediation of physical damage to property and other costs ($5m);[24]

    (e) rehabilitation and site closure, monitoring obligations, and possible site reconstruction (with the amount of the bond to be determined through a post-consent process);[25]

    (f) the *"appropriate control and abandonment"* of geothermal wells ($30,000 per well);[26]

    (g) remediation of property damage and water contamination, and monitoring surveys ($5m initially);[27] and

    (h) monitoring (and any remedial action) and default under the conditions ($6.35m initially, reducing over time, and a Letter of Undertaking for $5m).[28]

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[19] Paragraph [167] of the opening legal submissions for STOS.
[20] Noting that section 109 of the RMA deems certain bonds to be an instrument creating an interest in land.
[21] *Arrigato Investments Limited v Rodney District Council* A145/2002 (ECrt) "***Arrigato***"). While this decision was appealed, the matters pertaining to the bond were not. The bond imposed in this decision was subject to further litigation, and appeal (ultimately to the Court of Appeal in *Rodney District Council v Fisherton Limited* [2005] NZRMA 514). However, the subject of the appeal related to the registering of the bond against the title to the land in question which is not relevant under the Act.
[22] *Waaihi Gold Company v Waikato Regional Council* A146/98 (ECrt) and A114/99 (ECrt).
[23] *Crest Energy Kaipara Limited v Northland Regional Council* [2011] NZEnvC 26 (ECrt).
[24] *Rotokawa Joint Venture Limited v Waikato Regional Council* A 41/2007 (ECrt).
[25] *Transwaste Canterbury Limited v Canterbury Regional Council* C29/04 (ECrt).
[26] Final Report and Decision of the Board of Inquiry into the Tauhara II Geothermal Development Project, December 2010.
[27] Ibid.
[28] Decision of Panel on MV Rena Resource Consent Applications, Bay of Plenty Regional Council, 26 February 2016; https://www.renaresourceconsent.org.nz/decision-26-february-2016/.

The bond amount

37. In the RMA context, judicial discussion has tended to focus on the amount of the bond, which is an evidential matter for the decision-maker to decide in the circumstances of each case. The main driver in ascribing a bond value is the likely cost of the consent authority (or a third party) complying with the bonded condition, in the event that the consent holder fails to do so, plus a contingency.[29]

38. As can be seen from the examples noted above, the amount of the bond (or at least an initial amount) is commonly specified in the conditions. Another option is not to stipulate an initial bond amount, but rather require a process of the consent holder, typically, developing a cost estimate based on a risk assessment and then agreeing the bond amount with the consent authority (or through arbitration, if no agreement is reached).

39. In most cases provision is made for the bond amount to be reviewed on a regular basis and adjusted in certain circumstances.

Legal form and wording

40. Typically, conditions requiring a bond provide:

    (a) the purpose of the bond (that is, the specific conditions, the performance of which is to be secured by the bond);

    (b) the bond amount, as discussed above, or a mechanism for arriving at the amount (including a dispute resolution provision);

    (c) the type of bond, such as cash held in trust by the consent authority or a bank security (although this can be left to be determined in future, such as in this example from the *Crest Energy* decision: *"The form of the bond shall be a cash amount or a bank or other security acceptable to the Northland Regional Council (…) The total bond may comprise combinations of the above alternatives (…)"*[30]);

    (d) a requirement that the consent holder pay for the costs associated with obtaining and maintaining the bond (including those of the consent authority);

    (e) the term during which the bond remains in force;

[29] The Planning Tribunal in *Bletchley Developments Ltd v Palmerston North City Council* W58/92 (at 10) suggested that an appropriate level of bond be based on estimated costs plus a factor of 25%.
[30] Schedule 2, condition 2.8.

(f) provisions to review the appropriateness of the bond amount in the future, and to provide adjustments for inflation;

(g) default provisions, for example in relation to interest;

(h) that the consents may not be transferred unless the transferee enters into and thereafter maintains the bond.

41. The form and complexity of bond-related conditions vary depending on the circumstances of the matter.

MONITORING ACTIVITIES NOT RESTRICTED BY THE ACT

What is the scope for the DMC to monitor activities that are not restricted by the Act?

Introduction and summary

42. We understand this question to be asking about the scope for the DMC to impose conditions envisaging monitoring of the effects of activities that are not restricted by the Act. The question arises because the wording of section 63 authorises imposing conditions to manage the effects of *"the activity authorised by the consent"*, and mining applications such as TTRL's incorporate a wide range of activities, some of which are arguably not *"authorised"* by the consent.

43. The issue was first raised in the 2013 application by TTRL, in the context of discussing whether effects of the discharges into the water column (including the creation of the sediment plume) were capable of being subject to conditions. Discharges were not a restricted activity under the Act at that time.

44. Counsel for the EPA provided legal advice that the matter was finely balanced, but the EPA's preferred interpretation precluded conditions being imposed on the effects of activities not restricted by the Act on the basis there was no compelling rationale to assume a legislative intent to allow conditions to deal with the full range of effects from an application.[31]

45. However, that DMC concluded on the specific facts before it that the release of material into the water column would be an effect of the mining and was, in

[31] Memorandum from EPA legal counsel dated 1 April 2014.

that case, capable of being regulated by conditions on a marine consent despite not being restricted by the Act at the time of the decision.[32]

46. While the decision relating to TTRL's previous application is not binding on this DMC, it is open for the DMC to apply similar reasoning and reach a similar conclusion having considered our analysis outlined below – that is, provided the DMC is satisfied, from a factual perspective, that monitoring of effects of activities not restricted by the Act would be an intregral component of the operation.

Scope of section 63

47. A marine consent can only *"authorise"* an activity that falls within the list of restricted activities in section 20.[33] As discussed above, the power to impose conditions under section 63 is very broad. We consider the wording of section 63 could be interpreted to authorise conditions that deal:

    (a) only with direct effects of an activity listed in section 20 (that is, effects that can be said to have been caused by the listed activity and not be caused by some other activity such as monitoring) (the 'narrow approach'); or

    (b) with all effects (direct or indirect) that occur as a consequence of the activity listed in section 20 (i.e. including effects that might be caused by some other activity such as monitoring).

48. The starting point to resolve any ambiguity is section 5(1) of the Interpretation Act 1999, which provides that the meaning of an enactment must be ascertained from its text and in light of its purpose.

49. In ascertaining the meaning of a statutory provision, the context within which the provision was enacted and is to be interpreted is vital. Relevant context can be internal, including the place of the provision in the scheme of the particular statute, and/or external, including other statutes and the common law, social and economic factors, and Parliamentary history.

The narrow approach

50. The arguments in favour of a narrow approach focus largely on the following wording used in section 63: *"(…) adverse effects of the activity authorised by the consent"*.

[32] Paragraph 101 of the decision on TTRL's 2013 application, dated 17 June 2014.
[33] An equivalent analysis would also apply in respect of section 20B.

51. Comparing the language of section 59(2)(a) and (b) with section 63 suggests that the conditions must be limited to the direct effects of the section 20 activity. Section 59(2)(a) refers to the *"effects (…) of allowing the activity"* and section 59(2)(b) refers to the *"effects (…) of other activities"*.

52. By comparison, section 63 uses more limited language. The words in section 63(1) *"effects of the activity authorised by the consent"* signal a narrow approach. Similarly, section 63(2)(a)(iii), which provides the ability to impose conditions requiring the consent holder to monitor and report on the exercise of the consent, uses the words *"the exercise of the consent and the effects of the activity it authorises"*.

53. If Parliament had intended that the effects considered under section 59(2)(a) would be able to be the subject of conditions, we would expect it to have used the same or similar language to that found in section 59. Using different wording suggests that the scope of section 63 is different to section 59.

54. The word *"of"* in the section plainly requires a causal connection between the authorised activity and the effect – the effect must be *"of"* the activity – but there is no express guidance on how direct the connection must be. While some care should be taken trying to work out where one activity (or cause) ends and the effects (or another activity) begins, the scheme of the Act is to regulate a specific list of activities, and that list does not specifically include monitoring.

The broad approach

55. The arguments in favour of a broad approach tend to focus on the principles of effect assessment and management.

56. If the condition-making powers (under section 63) are confined to the effects of the regulated activity, and yet the determination (under section 59) may take into account other effects, then the EPA would be left without tools to directly manage those other effects: if it has significant concerns about those effects its only recourse would be to manage those indirectly (if possible) through conditions on the regulated activities, or take them into account as part of its decision to grant or decline the consent. A broader interpretation of section 63 would therefore be notionally attractive, so that the breadth of the condition-making power were matched to the breadth of the matters that can be taken into account in determining the consent.

57. It might also be argued that it is artificial to draw a distinction between an effect that is a result of a section 20 restricted activity and an effect that will occur because the EPA authorises a section 20 activity.

58. For completeness, we note that it may be possible to take a liberal interpretation and infer *"the exercise of the consent"* and *"the effects of the activity it authorises"* in section 63(2)(a)(iii) refer to separate concepts which could give weight to arguments in favour of a broad approach. However, our view is that the stronger interpretation rests on the plain meaning of the words and noteable absence of a differentiating comma, which leads us to consider the two parts of section 63(2)(a)(iii) should be read together.

Conclusion

59. In summary, our view is that either interpretation is supportable. The primary guide should be the express language of the section. To give full effect to that language, a 'narrow' approach would have to be applied, even though that could produce a rather unbalanced outcome between the breadth of matters able to be considered in making a decision (under section 59) and the narrowness of matters that might be managed through consent conditions (under section 63).

60. However, we note it would still be open for the DMC to adopt a more pragmatic stance and apply the broad approach, provided the DMC is satisfied, from a factual perspective, that monitoring of the effects of activities not restricted by the Act would be an integral part of the operation.

CONDITIONS REQUIRING DIFFERENT OPERATIONAL PARAMETERS

What limitations (if any) are there on the DMC in respect of imposing conditions that require different operational parameters from the description of the activity in the application that was publicly notified?

61. As noted above, there is a very broad power under section 63 to impose conditions on an application. However, there are limitations on the amendments that can be made to an application, whether by conditions imposed by the consent authority or proposed by the applicant, in comparison to the publicly notified application.

62. There is an obligation for the public notice under section 45 of the Act to give a summary of the application and state where the application documents can be viewed. The primary purpose of the public notification is to allow

members of the public to assess whether or not they wish to make a submission, in particular whether or not they are affected.

63. This is very similar to the approach taken under the RMA, and on that basis it is appropriate to rely on caselaw under the RMA to determine limitations for imposing conditions that might change the scope of the application from the publicly notified version. Amendments to the way in which the proposal is carried out can be made during the course of the hearing, and be reflected in conditions, provided that the proposal as amended is not:

> *"(…) significantly different in its scope or ambit from that originally applied for and notified in terms of:*
>
> *(i) The scale or intensity of the proposed activity, or*
>
> *(ii) The altered character or effects/impacts of the proposal.*
>
> *Whether there might have been other submitters, had the activity as ultimately proposed to the consent authority been that applied for and notified, is a means of applying or answering the test. But it is not the test itself."*[34]

64. This test is applicable to differentiate between operational detail in the conditions, which may be amended without going outside the scope of the application, and the more fundamental aspects of the application that cannot be changed without it being a different activity for which marine consent is required. An example to illustrate this point would be the addition of an entirely new source of a discharge, which would likely give rise to a significantly different character or scale of effect and require an additional application for marine discharge consent. In contrast, changing the location of a structure for the source of a discharge identified in the original application would be unlikely to require a new application, provided that the scale of effects (including on any location-specific existing interest) is not significantly different.

65. It is noteworthy that a change of location for the entire activity can fall within the scope of the application, depending on the facts, but only if the tests set out above are satisfied. In some circumstances a change in location would not be possible within the scope of the proposal as originally applied for, using the criteria in *Atkins* noted above, particularly where there is a

[34] *Atkins* v *Napier City Council* HC (2008) 15 ELRNZ 84; [2009] NZRMA 429, paras 20-21.

significant change in the character or scale effects, perhaps indicated by the proposal now affecting different people.

66. The example of the relocation of anchor points is unlikely to trigger these issues, provided these remain within the jurisdiction of the Act (ie not within the coastal marine area), or do not impinge on sensitive sites or existing interests as identified in evidence.

RELEVANCE OF THE MINING PERMIT BOUNDARY

What relevance does the boundary of the mining permit have to the application for marine consents?

67. Under the Act, the relevance of a mining permit is addressed in section 59 where it is clear that the nature and effect of other MMRs are relevant considerations. However, there is no requirement to hold a mining permit or any other type of authorisation under another regime before applying for a marine consent.

68. As there is no prerequisite to have a mining permit before applying for marine consents, the relevance of the intersection between the two from a spatial perspective is largely factual rather than having legal significance.

69. The mining permit provides the authorisation to extract minerals from the specified area. This limit on the authorisation will place an operational limit on the proposal. The application for marine consent can go beyond this area but the marine consent, if granted, does not provide the authorisation to extract minerals so the scope of the mining permit would still provide the operational limit in this sense. The marine consent does not replace or override the mining permit in terms of authorisation.

70. The mining permit does not dictate the location of other aspects of the operation. It does not dictate the scope of the application for marine consents, nor does it limit the scope of conditions that may be put on any marine consents, from a spatial perspective.

71. This interaction between authorisations is the same on land as it is in the coastal space. Obtaining a resource consent to operate a mine does not authorise the extraction of the minerals which are still subject to the authorisation provided in a mining permit and any conditions on that permit must also be complied with.

72. In summary, the boundary of the mining permit only determines the area from which minerals are able to be extracted. It does not determine the boundary for an application for marine consent, nor does it determine the location of aspects of a proposal that are not extraction.

DATED at Wellington this 13th day of April 2017

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Celia Haden / Michael Allan / David Randal

Counsel assisting the Decision-Making Committee